MAGESWARY KANNAIAH

v.

VITHYLINGAM MAYANDY & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D8-22-1551-2007]
25 FEBRUARY 2009

COMPANY LAW: *Accounts - Inspection, application for - Whether application made in bad faith - Companies Act 1965, s. 167*

This was an appeal by the defendants from the decision of the deputy registrar in allowing the plaintiff's application to inspect the company's account under s. 167 of the Companies Act 1965. The defendants submitted that the plaintiff, as a director, was obtaining the information from the books of the company for an improper purpose and should not be allowed to do so. According to the defendants, by setting up a rival company doing the same business the plaintiff had acted in breach of her fiduciary duty not to act against the interests of the company. The plaintiff, however, argued that the company formed by the plaintiff had nothing to do with the business of the defendant.

Held (dismissing the appeal):

(1) The plaintiff as director had the absolute right to inspect the accounts and books of the company pursuant to s. 167 of the Companies Act 1965. There was no such situation shown to have arisen where the interest of the company needed to be protected. The fact that the plaintiff had set out a rival company did not *ipso facto* indicate that she would be using the accounts and books for the ulterior purpose of benefiting the company that she had set up. The plaintiff should also be allowed to substitute the new accountant for the previous one for the purpose of providing the undertaking under s. 167(6) of the Companies Act 1965. It was to be appreciated that the undertaking to be provided under this sub-section was the power of the court to appoint an auditor where it made an order for inspection and not the right of the company to insist on having one.

A **Case(s) referred to:**
Dato' Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd [2004] 1 CLJ 317 HC ***(refd)***
Paul Nicholson lwn. Faber Medi-Serve Sdn Bhd dan Lain-lain [2002] 5 CLJ 383 HC ***(refd)***

B **Legislation referred to:**
Companies Act 1965, s. 167(3), (6)

Other source(s) referred to:
Companies (General) Handbook MLJ Handbook Series 2004, pp 230, 231

C *For the plaintiff - P Yugan; M/s Siva Thurai Mariany & Co*
For the defendants - David Samuel; M/s Chambers of Firdaus

Reported by Suhainah Wahiduddin

D

JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment: ***(ex-tempore)***

E

[1] This is an appeal by the defendants from the decision of the deputy registrar in allowing the plaintiff's application to inspect company's account under s. 167 of the Companies Act 1965 which read as follows:

F

167. Accounts to be kept.

(1) Every company and the directors and managers thereof shall cause to be kept such accounting and other records as will sufficiently explain the transactions and financial position of
G the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.

H (1A) Every company and the directors and managers thereof shall cause appropriate entries to be made in the accounting and other records within sixty days of the completion of the transactions to which they relate.

I (2) The company shall retain the records referred to in subsection (1) for seven years after the completion of the transactions or operations to which they respectively relate.

(3) The records referred to in subsection (1) shall be kept at the registered office of the company or at such other place in Malaysia as the directors think fit and shall at all times be open to inspection by the directors.

(4) Notwithstanding the provisions in subsection (3), the accounting and other records of operations outside Malaysia may be kept by the company at a place outside Malaysia and there shall be sent to and kept at a place in Malaysia and be at all times open to inspection by the directors, such statements and returns with respect to the business dealt with in the records so kept as will enable to be prepared true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto.

(5) If any accounting and other records are kept at a place outside Malaysia pursuant to subsection (4), the company shall, if required by the Registrar to produce those records at a place in Malaysia, comply with the requirements.

(6) The Court may in any particular case order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, but only upon an undertaking in writing given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.

(7) If default is made in complying with this section the company and every officer of the company who is in default shall be guilty of an offence against this Act.

[2] Mr. David Samuel For The Defendants

i. It is conceded that the plaintiff as a director has a right to inspect the company's account pursuant to s. 167(3) of the Companies Act 1965. But in this case we have evidence that the director is obtaining the information from the books of the company for an improper purpose and as such should not be allowed to do so. I am relying on the case of *Dato' Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* [2004] 1 CLJ 317 per Zainun Ali J at Held (1):

> The right of a director to inspect accounting and other records under s. 167(6) of the Act is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company. It is implicit therefore that this right must be exercised for the benefit of the

company. However, although the right of inspection is unqualified but if it is proved that a director is acting or is about to act in breach of his fiduciary duty to the company and intends to aid that process by inspecting the books, then his right to inspection disappears. (pp 323 g-h. 325 b-c & 327 a-e)

ii. In the instant case the plaintiff director it is clear is using the accounts and books of the company to access the clients of the company and other sensitive information for the benefit of another company which she had set up in competition with the 2nd defendant company. See affidavit of Vithylingam a/l Mayandy (the 1st defendant), the only other shareholder in the 2nd defendant company at para 12.

iii. By setting up a rival company doing the same business the plaintiff director of the 2nd defendant company has acted in breach of her fiduciary duty not to act against the interest of the company. There is no specific proof to show that what she is after is the clients' list but the court is at liberty to look at the evidence and come to a conclusion that the purpose of the access to the account is to use the information against the company such as costing, list of clients, etc. This is within the purview of Dato' Tan Kim Hor. The plaintiff had moved funds out of the company at the time when she was managing the company when the 1st defendant was incapacitated. See company accountant's report entitled Due Diligence Report on Petty Cash Management and Due Diligence Report on Fund Management (exhs. "V3" and "V4" in encl. 7).

iv. The plaintiff has served on us an affidavit by a new accountant giving his undertaking not to disclose under s. 167(6). This affidavit should not be allowed into evidence on the ground that there already exists an undertaking by a different accountant.

[3] Mr. P. Yugan for the plaintiff

i. Look at p. 230 of *Companies (General) Handbook MLJ Handbook Series 2004* at p. 231:

Right to inspect accounting records. The court does not have a discretion to disallow a director access to the company's books, the right to inspect being 'absolute'; see *Haw Par Bros Pte Ltd v. Aw Kow* [1973] 2 MLJ 169 at 170; *Leong Sun Wing v. Wah Hup Engineering Works Sdn Bhd* (unreported; reproduced in Pillai *Sourcebook of Singapore and Malaysian Company Law* (2nd edn, 1986) Butterworths at pp 304, 305). A director's right to examine the accounts is an incident of his office and he does not have to justify his desire to do so; see *Welch v. Britannia Industries Pte Ltd* [1673] 1 SLR 673. In *Wuu Khek Chiang George v. ECRC Land Pte Ltd* [1999] 3 SLR 65, 78 (CA, S'pore) LP Thean JA explained the basis of the right of inspection: 'The right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director, including the duty to ensure that the company complies with the requirements as to accounts set out in the Companies Act ... Such right is an important one, as the books and records of a company are a primary, and sometimes the only, source of information as to the state of affairs of a company. It follows that unless a director has access to these sources of information, he would be severely inhibited in the proper performance of his duties. So long, therefore, as such right is exercised for that purpose and not with a view to causing any detriment to the company, the right to inspect is 'absolute'. In this sense and to that extent, the right may be termed 'absolute'. The corollary of this is that the right will be lost where it is exercised not to advance the interests of the company but for some ulterior purpose or to injure the company.'

The director who wants to inspect the accounts does not have to justify his request. The onus of establishing that the right of inspection is being or will be exercised for an improper purpose lies on the person who asserts it: *Wuu Khek Chiang George v. ECRC Land Pte Ltd, supra* at 79. In the light of this, it is likely that in practice it will be very difficult – if not impossible – to refuse access to a director. Seldom will there be 'clear proof' (to use Thean JA's term) that the director is acting against the interest of the company. In this connexion it is necessary to make a clear distinction between the interest of the company and those of the controllers. The fact that it is against the interest of the majority shareholders to grant access to the accounts does not *ipso facto* make it detrimental to the company's interests.

In *Paul Nicholson lwn. Faber Medi-Serve Sdn Bhd dan lain-lain* [2002] 1 MLJ 355, the court held the right of a director to inspect the company's documents was a mandatory right provided under s. 167 of the Act. This statutory right was given so that the director could discharge his responsibilities fairly and equitably for the benefit of the company and the shareholders. The director was entitled to be informed regarding matters that had occurred in the company and such information could be obtained from the company's documents. Section 167(3) of the Act conferred an absolute right to the director to inspect the company's documents and records. Therefore, the conditional consent given by the first defendants to the plaintiff's request for information was a denial of that absolute right. There was no necessity for the plaintiff to give the undertakings as requested by the first defendant, as there were legal provisions to provide for the same. Accordingly, the auditor appointed to assist the plaintiff was required to give to the court an undertaking that he would not disclose any information obtained in the course of the audit. This was clearly consistent with the provisions of s. 167(6) of the Act. The plaintiff's application and the proceedings were two different matters. The first defendant should not hide behind this issue and use to as an excuse to deny the plaintiff of his right to inspect the company's documents.

See *Paul Nicholson lwn. Faber Medi-Serve Sdn Bhd dan lain-lain* [2002] 1 MLJ 355 per Wan Adnan Muhamad J at 356:

This was an application by the first defendant's director ('the plaintif) for an order that he be given access to the accounting and other records of the first defendant ('the company's records'). The plaintiff had requested the first defendant to allow him to inspect the company's records but the request was declined. However, the first defendant stated that it did not refuse the plaintiff's request for inspection of the company's records but merely required the plaintiff to undertake that he would not disclose the company's documents to a third party ('the conditional consent'). According to the first defendant, there was a possibility that the company's records would be used against it in respect of proceedings in a petition made against the first defendant ('the proceedings') pursuant to s. 181 of the Companies Act 1965 ('the Act').

Held, allowing the plaintiffs' application:

(1) The right of a director to inspect the company's documents was a mandatory right provided under s. 167 of the Act. This statutory right was given so that the director could discharge his responsibilities fairly and equitably for the benefit of the company and the shareholders. The director was entitled to be informed regarding matters that had occurred in the company and such information could be obtained from the company's documents (see p 360G-I).

(2) Section 167(3) of the Act conferred an absolute right to the director to inspect the company's documents and records. Therefore, the conditional consent given by the first defendant to the plaintiff's request for information was a denial of that absolute right (see p 361G-D).

(3) There was no necessity for the plaintiff to give the undertaking as requested by the first defendant, as there were legal provisions to provide for the same. Accordingly, the auditor appointed to assist the plaintiff was required to give to the court an undertaking that he would not disclose any information obtained in the course of the audit. This was clearly consistent with the provisions of s. 167(6) of the Act (see p 361G-H).

(4) The plaintiff's application and the proceedings were two different matters. The first defendant should not hide behind this issue and use it as an excuse to deny the plaintiff of his right to inspect the company's documents (see p 362A, C).

ii. The purpose of seeking to look into the books of the company is to audit the company from the period 2007 up to today. The year 2007 is significant as she has been disallowed from inspecting the company's books and accounts.

iii. The company that was formed by the plaintiff has got nothing to do with the business of the 2nd defendant. *Dato' Tan Kim Hor's* case is different. It is only because there was no undertaking by the accountant under s. 167(6) that the court did not allow inspection. The emphasis is "if it is proved" that there was an ulterior purpose detrimental to the company.

A iv. The first undertaking was given when the matter went up before the deputy registrar. Now the accountant has refused to take out the job. We are merely now substituting a new accountant with a new undertaking.

B **Decision**

[4] I would agree entirely with the submission of counsel for the plaintiff that his client as a director has the absolute right to inspect the accounts and books of the company pursuant to s. 167 of the Companies Act 1965 for the purpose as stated in the Companies (General) Handbook MLJ Handbook Series 2004 which he relied on.

[5] Situations may however arise where there may be a need to protect the interest of the company. Where it is clear that the inspection is only required for such ulterior purpose of obtaining confidential information for use by its trade competitor, it would be perfectly legitimate to refuse inspection or indeed to restrict or restrain the director from having access to the company's account altogether.

[6] Having considered the submission and affidavits of the parties, it is clear to me that no such situation has been shown to have arisen where the interest of the company needs to be protected. The fact that the plaintiff had set out a rival company does not *ipso facto* indicate that she would be using the accounts and books for the ulterior purpose of benefiting the company that she had set up.

[7] The plaintiff should be allowed to substitute the new accountant for the previous one for the purpose of providing the undertaking under s. 167(6) of the Companies Act 1965. It is to be appreciated that the undertaking to be provided under this subsection is the power of the court to appoint an auditor where it makes an order for inspection and not the right of the company to insist on having one.

[8] The appeal is dismissed with costs.